

ORIGINAL

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D. C. 20554

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In the Matter of	)	FEDERAL COMMUNICATIONS COMMISSION
	)	OFFICE OF THE SECRETARY
Amendment of Section 73.202(b)	)	MB Docket No 03-36
Table of Allotments,	)	RM-10431
FM Broadcast Stations.	)	
(Woodbine, Iowa)	)	
	)	
Reclassification of license	)	
of Station KEXL (FM)	)	
Norfolk, Nebraska	)	

To: Assistant Chief, Audio Division

**OBJECTION OF WJAG, INC.**

WJAG, Inc., licensee of Station KEXL (FM), Norfolk, Nebraska ("KEXL"), hereby objects to the reclassification of Station KEXL from Class C to Class C0 as proposed in the *Notice of Proposed Rule Making*, DA 03-370, released in this proceeding on February 7, 2003 (the "*Notice*"). The proposed downgrade, which is a prerequisite to the allotment of Channel 293A to Woodbine, Iowa, may not proceed as proposed in the *Notice* because KEXL did not receive notice of the Commission's proposal, and thus was deprived of its right to preserve its Class C status and otherwise to show cause why KEXL's license should not be modified.

An *Order to Show Cause*, DA 02-1 157, directed to KEXL, and proposing the station's downgrade to Class C0, was released on May 17, 2002 (the "*Order*"). The *Order* was issued in response to a petition for rule making (the "*Petition*") filed January 24, 2002 by Harrison County Radio ("Harrison"), which *Petition* sought the allotment of

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Channel 293A to Woodbine, Iowa. As both the Petition and the *Order* recognized, the Channel 293A allotment to Woodbine could not be accomplished without downgrading KEXL, which operates on first-adjacent Channel 294C at Norfolk, Nebraska.

The procedures used to accomplish a C0 downgrade were established in 1998 *Regulatory Review --Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules (Second Report and Order* in MM Docket No. 98-93). 15 FCC Rcd 21649, 21662-67 (2000) (the "*Streamlining Order*"). The *Streamlining Order* requires that the "triggering" application, or in the case of a rule making petition, the triggering pleading, "...be served on the licensee whose authorization the triggering application [or pleading] seeks to modify." *Streamlining Order* at 21662-63. Further, Section 1.401(d) of the rules requires:

Petitions for amendment of the PM Table of Assignments...shall be served by petitioner on any Commission licensee or permittee whose channel assignment would be changed by grant of the petition.

47 CFR Sec. 1.401(d).

Further, the *Streamlining Order* requires that the Commission itself notify such a potentially affected licensee. ....by issuing an order to show cause via certified mail, return receipt requested." *Id* at 21663. Indeed, when a license modification is proposed: as here, such agency notice is required by Section 316 of the Communications Act of 1934, as amended. Section 1.87(b) of the Commission's rules, which implements Section 316, is specific as to the certified mail, return receipt requirement. Consistent with the statutory requirement, the *Order* itself, at paragraph 7, stated:

IT IS FURTHER ORDERED, That the Commission's Consumer and Government Affairs Bureau, Reference Information Center, SHALL Send a copy of this Order to Show Cause by Certified

Mail. Return Receipt Requested, to WJAG, Inc., Radio Station  
KEXL, 309 Braasch Avenue, P.O. Box 789, Norfolk, NE 68701

In spite of these mandatory statutory and rule requirements, grounded in Section 316 of the Act, the required notices were not given. The Petition has no certificate of service and there is no other indication in the pleading that it was served on KEXI, as the *Streamlining Order* and Section 1.401(d) of the rules require. The Petition should have been rejected on this basis or, at a minimum, Harrison should have been required to serve a copy of the Petition on KEXI, and then amend its filing to demonstrate that the required service had been accomplished. This did not happen.

An inquiry by the undersigned counsel to the staff at the Consumer and Governmental Affairs Bureau, Reference Information Center (the "Center") on March 26, 2003 revealed that at no time in the spring of 2002 did the Commission send a certified letter, return receipt requested, to WJAG, Inc. The Center keeps a log of all such certified letters, and of the return receipts. It has no record of having sent such a communication to WJAG, Inc., or having received a return post card. The Center's records indicate that such an item may have been sent by regular mail, but no verification of such mailing exists.

KEXI, had no actual notice of the Commission's proposal to modify KEXL's license by downgrading its classification to Class C0. Attached is a declaration of Robert G. Thomas, Vice President of the licensee and general manager of Station KEXL. Mr. Thomas confirms that neither he nor anyone else at KEXL received a certified communication from the Commission transmitting the *Order*. Nor did he receive a copy of the Petition until March 24, 2003, and did not learn of the proposed KEXL license modification until "approximately 10 days ago" (*i.e.*, March 14 or 17, 2003). Thomas

confirms that the FCC has the station's correct address, shown in the *Order*, and that, "A certified letter from the Commission would have received special care and attention."

Clearly, no such certified letter ever was sent to KEXL, and it otherwise had not notice of the looming reclassification until mid-March, 2003.

In light of these circumstances, which include the failure by both Harrison and the Commission to provide the notices to KEXL required by the Communications Act and the Commission's rules, and the fact KEXL had no actual notice of the proposed downgrade, the Commission must rescind the *Notice* and the *Order* and dismiss the Petition as defective. Alternatively, it must hold the proceedings in MB Docket 03-36 in abeyance pending issuance and proper service of an order to show cause that affords KEXL the 30 days to which it is entitled under Section 73.3573, note 4, to file an expression of its intention to file an application for minimum Class C facilities. (Section 73.3573, note 4, provides such a grace period after a "triggering" order to show cause is issued and sent to the licensee by certified mail, return receipt requested.) KEXL, which in all likelihood will file such a statement of intention, then would be afforded the 180-day period afforded under Section 73.3573, note 4, for filing its application for minimum Class C facilities.

In sum, neither Harrison nor the Commission followed proper procedures in proposing a modification of KEXL's license. For this reason, KEXL's license legally cannot be modified in the current procedural context of this proceeding. *See Florida Institute of Technology v FCC*, 952 F.2d 549, 533 (DC Cir. 1992) (an agency's failure to follow its own rules is "fatal to the deviant action."). KEXL appeals to the Commission to redress the denial of due process and unfairness that has occurred here. KEXL should

be afforded the procedural rights to which it is entitled under the Act and the rules. To deny such rights in the circumstances outlined above, and downgrade KEXL's license without having afforded it an opportunity to show cause why the public interest would not be served thereby, would be both unjust and unfair.

**WHEREFORE,** It is respectfully requested that the Commission (1) RESCIND the *Notice of Proposed Rule Making* and the *Order to Show Cause* issued in this proceeding; (2) DISMISS the Petition; and/or REISSUE and properly SERVE on KEXL by certified mail, return receipt requested, an order to show cause that affords KEXL, 30 days within which to state its intention to file an application for a construction permit for Class C facilities; or (4) GRANT such other relief as may be deemed appropriate under the circumstances set forth above.

Respectfully submitted.

WJAG, INC.     **•**

By

  
Harry C. Martin  
Its Attorney

Fletcher, Heald & Hildreth, P.L.L.C.  
1300 North 17<sup>th</sup> Street  
11<sup>th</sup> Floor  
Arlington, VA 22209  
703-811-0415

March 31, 2003

**DECLARATION OF ROBERT G. THOMAS**

I. Robert G. Thomas, hereby declare and state as follows:


1. I ~~am~~ Vice President and General Manager of WJAG, Inc., licensee of Stations WJAG and KEXL, Norfolk, Nebraska. I ~~am~~ giving this declaration for submission to the Federal Communications Commission in MB Docket **03-36** in response to the *Notice of Proposed Rule Making* (the "*Norice*") issued in that proceeding on February 7, **2003**. In the *Norice*, the Commission proposes to downgrade Station **KEXL** from FM Class C to FM Class CO.

2. Neither I nor, to the best of my knowledge, **anyone** else at **WJAG, Inc.** received any notice of the Commission's proposed downgrade of Station **KEXL** until approximately 10 days ago. Specifically, WJAG, Inc. did not receive a certified letter, return receipt requested, from the Commission or anyone else that included a copy of the Order to **Show Cause**, DA **02-1157** issued by the agency on May **17, 2003**. Nor **were** we served with a copy of ~~the~~ petition for rule making filed by Harrison County Radio which precipitated the issuance of the **Order to Show Cause**. The first time I saw that petition was March **24, 2003**. Nor, to the best of my knowledge, did the Commission mail a copy of the *Notice* to **WJAG, Inc.**

3. The address shown in the **Order to Show Cause**, in paragraph 7 thereof, is accurate and had mail been directed to **WJAG, Inc.** at that address, it would have been received by the company, read and acted upon. **A** certified letter from the Commission would have received special care and attention. No such communication ever was received.

I hereby state under penalty of perjury under the laws of the United **States that the**  
foregoing is based on my **personal** knowledge or belief and **is** true and correct.

Dated: March 26, 2003

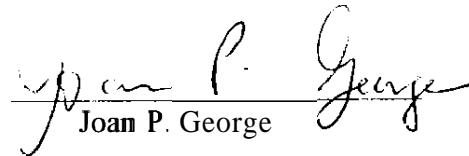
  
Robert G. Thomas

**CERTIFICATE OF SERVICE**

I, Joan P. George, a secretary in the law firm of Fletcher, Hald & Hildreth, do hereby certify that a true copy of the foregoing *Objection of WJAG, Inc.* was sent this 31<sup>st</sup> day of March, 1993, by hand where indicated and via United States First Class Mail, postage prepaid, to the following:

Nancy Joyner  
Federal Communications Commission  
The Portals  
445 11<sup>th</sup> Street, SW, Room 3A-267  
Washington, D.C. 20554

Harrison County Radio  
1240 Loomis Avenue  
Des Moines, IA 50315

  
Joan P. George